BOARD OF INQUIRY (*Human Rights Code*)

Library

IN THE MATTER OF the *Ontario Human Rights Code*, 1981, S.O. 1981, c.53, as amended;

AND IN THE MATTER OF the complaint by Lynne Barclay dated December 12, 1990, alleging discrimination with respect to services because of association on the basis of race, colour and ancestry by the Royal Canadian Legion, Branch12, Linda Paul and Tom Markham.

B E T W E E N :

Lynne Barclay

Complainant

- and -

The Royal Canadian Legion, Branch 12,
Tom Markham and Linda Paul

Respondents

DECISION

Adjudicator : Deborah J. Leighton

Date : September 24, 1997

Board File No: BI-0004-93

Decision No : 97-020

Board of Inquiry (*Human Rights Code*)
150 Eglinton Avenue East
5th Floor, Toronto ON M4P 1E8
Phone (416) 314-0004 Fax: (416) 314-8743 Toll free 1-800-668-3946

APPEARANCES

Lynne Barclay, Complainant	)	Betsy Lundborg, Agent
Royal Canadian Legion, Branch 12, Corporate Respondent	)	Fred Moden, Agent
Linda Paul, Personal Respondent	)	On her own behalf
Tom Markham, Personal Respondent	)	On his own behalf

INTRODUCTION

Ms. Lynne Barclay filed a complaint with the Human Rights Commission on December 12, 1990 alleging that the Royal Canadian Legion, Branch #12 (hereinafter the Legion), Linda Paul (hereinafter Paul), and Tom Markham (hereinafter Markham), contravened Sections 8 (now Section 9) and Section 11 (now Section 12) of the Ontario Human Rights Code R.S.O. 1990, c.H.19. The complainant alleged that the personal Respondents participated in a loud racist conversation on the evening of September 12, 1990 in the Legion, and that when she confronted them regarding the racial jokes and comments, the Respondents retaliated by disciplining and eventually suspending her from the Legion. Upon motion of the Complainant, this Board amended the complaint on November 15, 1995 to include a complaint of reprisal pursuant to Section 8 of the Code.

Shortly before this case was to begin being heard upon the merits, the Human Rights Commission settled with the Respondents. Thus the case proceeded without the Human Rights Commission as a party. Neither the Complainant nor the Respondents were represented by counsel. Ms. Betsy Lundborg presented Ms. Barclay's case. Mr. Fred Moden, President of Branch 12, represented the Legion.

EVIDENCE

There was evidence tendered in this case that was not relevant or necessary to making the decision. Thus I have summarized only what is relevant and what I have relied on to make the decision. Further details of the evidence will be referred to as necessary in my reasons for the decision.

The Complainant and Mr. Phil White testified that they were playing shuffleboard in the Legion clubroom on September 12, 1990, when their attention was drawn to a table where the personal Respondents and others sat having a loud discussion. The Complainant and White overheard racial jokes involving Indians, and specifically heard Markham saying something like "dirty fucking Indians should be taken out and shot." White and Barclay both testified that the Complainant went over to the Respondents' table and confronted them regarding the racist remarks. White also testified that he went over to the Respondents' table and objected to the conversation. They were both told to mind their own business and to leave the Respondents alone. White's evidence was that as he was leaving the table, he overheard someone say "We should take her down and have her shot

too." White understood this reference to be to the Complainant. The Complainant testified that she thought that loud racist remarks about both blacks and first nations people were inappropriate, particularly as they were being made at a table where Legion officers were present. Markham and Paul were both, at the time, officers of the Legion. The Complainant said in evidence that once she stated her opinion to the Respondents that their conversation was inappropriate in a Legion clubroom, she considered the matter finished and left the table.

The Respondents initially denied that a racist conversation had occurred. Markham stated that the group was discussing the Oka crisis and he had stated his opinion that the army should have been sent in on the first day to deal with the situation. He was of the view that the Complainant was eavesdropping on a private conversation and that she had no right to interfere with it.

Paul denied making racists remarks, or that she ever used the term "nigger." However, in a statement that Paul provided to the Commission, she admitted that a visitor from another Legion did use the term nigger, but that he meant no disrespect.

Ms. Betty Perron was also at the table that evening and denied that Paul and Markham made any racist remarks. She did say that one of the guests had entertained the group at the table with jokes and conceded that this individual told jokes using the term nigger. But she did not consider these jokes as racist: she said the guest was funny and everyone was laughing.

Ms. Chris Caithcart, the Clubroom Steward on the evening of September 12, 1990, testified that the guest, from another branch, was telling funny stories which she could hear clearly from the bar. She denies any racist comments were made.

White testified that on September 14, 1990, Markham threatened to suspend his and Barclay's Legion privileges if he or Barclay took any action regarding the September 12, 1990 conversation. Although White made no complaint, he was suspended by letter dated October 24, 1990. Shortly after the incident on September 12, 1990 the Complainant testified that Markham told her that he was going to have her out of the Legion.

Caithcart filed a formal complaint against Barclay on September 17, 1990. The complaint alleged in part

> Linda Paul, Tom Markham, Betty Perron and a couple from Hudson, Ontario (whom were guests of Betty Perron) were having a conversation, minding their own business, when Lynne Barclay came over to their table, interrupting their conversation, accusing

> them of racism. They weren't, in any way, intimidating her. She approached their table twice, interfering with them. Phil White also approached their table, siding in with Lynne.

This complaint was signed by Caithcart. In the place where there is room for three witnesses to the event to sign, Caithcart herself signed Hazel Lynd, Aggie Bezeit, and Betty Perron. This complaint was sent by registered mail to Barclay on September 19, 1990.

Caithcart testified that this was the only formal complaint that she had ever filed against a member, as a Clubroom Steward. She admitted that she had witnessed much rowdy behaviour during her tenure as Steward. Caithcart confirmed that she had subsequently withdrawn her complaint. It was her evidence that there was a problem with the by-law that she had used to make the complaint. When asked to explain this she was unable.

On September 26, 1990, having received the complaint of the Steward, Barclay filed formal complaints against the Respondents, Markham and Paul, with Manitoba/Northwest Ontario Command. She testified that when she received the Caithcart complaint she realized that the Respondents intended "to go after her."

By letter dated October 16, 1990, and received on October 19, 1990, the Complainant was notified that Markham had filed a complaint against her, alleging that she had "knowingly filed a false complaint against him." Markham's complaint was filed at the branch level. The letter notifying Barclay of the complaint also informed her that Paul had appointed herself to chair the Investigating Committee which would hear the Markham complaint. She had also suspended Barclay's Clubroom privileges pending the resolution of the Markham complaint.

On October 19, 1990, Barclay entered the Legion clubroom, confronted Paul and said that she would not recognize the suspension or the Markham complaint. Paul had been named in the complaint that Barclay had filed with the Provincial Command and, therefore, Paul was in a conflict of interest to investigate the Markham complaint filed at the branch level in Barclay's view. Paul and Markham are also common law spouses.

Barclay was not served in the Clubroom on the evening of October 19, 1990, but she was not asked to leave. This was confirmed in evidence by Caithcart, the Clubroom Steward that night. Barclay returned again on October 20, 1990 to the Clubroom. She got herself a glass of water and sat quietly at a table by herself, speaking to no one. Sometime later, Paul entered the Clubroom with

two policeman who came directly to Barclay's table. The police officer informed Barclay that they had a letter from Paul, who was President of the Legion, stating that her privileges had been suspended and therefore she was trespassing and had to leave. Barclay began to argue with the policeman regarding Paul's authority to suspend her privileges at the Clubroom, and the policeman took out handcuffs and said "If she says you are out, you are out." She was then escorted out after the police handcuffed her. It was her evidence that she was humiliated by this incident and she was left bruised by the handcuffs. Two witnesses confirmed that she was left with bruising to her wrists and upper arms, and that the skin on one wrist had been broken where the cuffs had been twisted.

Paul's evidence was that the Complainant yelled as she left and tried to kick her. Barclay said that she yelled something like "if she can do this to me, she can do it to you someday" to those sitting in the clubroom. She denied kicking Paul. She normally wears leg braces for a medical condition and said she was unable to kick, although she was not wearing them that night.

Ms. Haroldeen Wilson said that she was the Secretary Manager of the Legion at the time and, therefore, was in charge of the Clubroom on October 20, 1990. When she arrived at the Clubroom that evening she was surprised to find out that Paul had called the police rather than allowing her to handle the incident. Paul said on cross-examination that she had told the police that Barclay had been asked to leave the clubroom. She admitted on cross-examination that Barclay had not been asked to leave on October 20, 1990, prior to the police being called.

On October 29, 1990 Barclay went to the Human Rights Commission to make a complaint against the personal Respondents and Branch #12 of the Legion.

On November 3, 1990 Barclay's complaint to Provincial Command against Markham and Paul was heard in Winnipeg by the Provincial Command Investigating Committee. Both Barclay and White gave evidence at the hearing. Before the decision of Provincial Command, in a letter dated November 7, 1990, Barclay was informed that two further complaints had been filed against her by Paul and Mrs. Eunice Ballantyne because of the incident where she was removed from the clubroom by the police. Markham had appointed an Investigating Committee and suspended Barclay's Clubroom privileges again.

On November 21, 1990 the Markham complaint against Barclay for filing a false complaint went forward and was heard by the Investigating Committee chaired by Paul. Although Barclay

argued that it was inappropriate to go forward with this hearing until Provincial Command made a finding and a decision, Paul maintained that it was appropriate for Markham to file his complaint for making a false complaint, and for them to proceed.

On December 3, 1990 Provincial Command issued its decision on Barclay's complaint which was as follows:

> It was the unanimous decision of the Investigating Committee that the complaint be dismissed. The decision was based on the fact that the evidence submitted by both parties was directly contradictory and the doubt created was given to the benefit of the Defendant.

The Investigating Committee appointed to hear the Paul and Ballantyne complaints against Barclay met on December 5, 1990. In letters dated December 31, 1990, Barclay was notified that because of the Markham complaint and their finding that she had filed a false complaint she was being suspended from the Branch for twelve months less one day. By separate letter of the same date, she was notified that she had been deprived of Clubroom privileges for twenty-four months less one day because of the Ballantyne complaint. In a letter dated January 24, 1991 Barclay was notified that she had been deprived of Clubroom privileges for twenty-four months less one day because of the Paul complaint.

EVIDENCE OF REPRISAL

Barclay's Clubroom privileges were restored in January 1993. On April 25, 1995 she received a letter from President Moden of a new complaint against her, filed by Mr. A. Totten. Totten was complaining about an incident that occurred in the Clubroom on April 10, 1995. His complaint was that Barclay approached his table and began an argument. It was Barclay's evidence that on April 10, 1995, Totten, who had been seated at a table with Markham, approached her and tried to persuade her into dropping her human rights complaint. Barclay told Totten that she would not drop the complaint, and he became verbally abusive. Barclay's evidence was that Totten asked the Clubroom Steward to write Barclay up in the Bar Book and the Steward refused to do this.

After posting a notice asking for volunteers, President Moden appointed an Investigating Committee. On May 29, 1995 Barclay exercised her right to a peremptory challenge of one of the

members of the Investigating Committee. The peremptory challenge was denied by President Moden.

The Investigating Committee on the Totten complaint met on June 13, 1995 and found that the complaint was substantiated. The committee recommended that Barclay be suspended from the branch for a period of twelve months. A Special Committee of the Executive, consisting of President Moden, J. Pettigrew, and C. Stag, reviewed the Investigating Committee's recommendation, and decided to invoke Section 307(1)(g) of the General By-Laws, which permits a special committee to review the preceding five year history of offences of the accused legion member and consider whether expulsion from the Legion is justified. The Special Committee:

> Unanimously agreed that the penalty recommended by the Investigating Committee, although appropriate for this particular complaint, will do nothing to deter L. Barclay from future trouble making within the branch. For that reason, the Special Committee unanimously recommends to command that the penalty be changed to "expulsion from the legion" as per Section 307(1)(g) of the General By-Laws, Royal Canadian Legion.

This was signed by the three members of the Special Committee and dated June 14, 1995.

Provincial Command confirmed the decision of the Special Committee to expel Barclay on June 17, 1995, three days after Branch 12's decision.

Barclay appealed the Branch decision to both Provincial and Dominion Command. Provincial Command said her appeal was not timely and Dominion Command responded that the appeal must be made to Provincial Command. There was conflicting evidence as to where the appeal ought to have gone, but Mr. David Windsor, who was a Legion officer in another Branch, and with experience and knowledge of Legion By-laws, testified that the authority to make the decision rested with Provincial Command. He also gave evidence that since 1920, only six people in Canada had been expelled from the Royal Canadian Legion for such offences as a vicious assault on two legion officers, and the embezzlement of large sums of legion funds.

President Moden informed the Board that he had been told by Provincial Command to destroy all records, transcripts and notes of the Investigating Committee, and of the Special Committee. The record forwarded to Provincial Command had also been destroyed. Thus, in response to a motion for disclosure of documents on the Totten complaint, President Moden told this Board that he could not produce the documents, because they were no longer in existence. The Respondents put no

evidence before this Board on the reprisal issue except the report of the Special Committee of the Executive expelling Barclay, and Totten's evidence of what happened which lead to his complaint.

There was also evidence that Mr. Totten was not a member in standing of Legion Branch #12 when he made his complaint against Barclay and that, in fact, this is contrary to the Legion By-laws.

Mr. Robert Strain, the Chairman of the Provincial Command Review Committee, which reviewed Branch 12's decision to expel Barclay said that Provincial Command respects the autonomy of the local branches and generally approves whatever the branch recommends. Strain considered the decision to expel Barclay as Branch 12's decision. He confirmed that all records of the expulsion decision had been destroyed although he could not point to any Legion policy or by-law which required this. He had no memory of the evidence used to justify the decision to expel Barclay.

THE COMPLAINANT'S SUBMISSION

The Complainant's representative, Ms. Lundborg, submitted that Barclay was wrongly deprived of her Legion privileges and denied access to the facilities by Branch 12. She argued that the Legion is a registered corporation in the province of Ontario, registered for the purpose of providing goods and services as a "fraternal organization providing welfare services to veterans and dependents and community services at local, municipal, and national levels." Ms. Lundborg argued that Judith Keene, in her book "Human Rights in Ontario," notes that the words "to which the public is customarily admitted" were removed from Section 1 of the Code in 1981. Keens concludes that there is no public/private distinction, and the intention with the provision of goods and services is that a broad interpretation be given to the remedial legislation (p.18). Thus, the complainant argues that the Legion is bound by the provisions of the Code in its treatment of its members.

Although Ms. Barclay herself is neither black, nor a person of first nations' ancestry, she claims that her rights under Section 12 of the Code have been infringed because of her association with these people. Section 12 of the Code provides "a right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination." The Complainant quotes the Ontario Human Rights Commission Policy Statement on Racial Slurs and Harassment, and Racial Jokes, which addresses the issue of a poisoned environment created by offensive or threatening racial comments, jokes, signs

and cartoons. The complainant cites Jahn v. Johnstone (1977), unreported Ontario Board of Inquiry, Tabar v. Scott (1984) 6 C.H.R.R. D/2471, and Kafato v. Halton Condominiums Corp. (1991) 14 C.H.R.R. D/154. In all of these cases successful complainants were not members of groups identified by the Code.

Thus, although Barclay is not a member of the groups which were the object of the racial jokes, she is entitled to be free from a poisoned atmosphere where such jokes are made. She argues further that Section 12 has shifted the responsibility for combating discrimination from members of the minority to members outside of protected groups who may act on behalf of victims of discrimination. In conclusion, she argues that she fulfilled her responsibility under Section 12 when she confronted the racism in the Legion clubroom.

Ms. Lundborg argued that a prima facie case for discrimination is established in the evidence in that even the Respondents' own witnesses admitted that racist jokes were made at the table. The Complainant points out that even in cross-examination, having acknowledged that racist jokes were made, none of the witnesses were willing to acknowledge that the jokes were inappropriate. There was no evidence that they were regretful or sorry about being part of such a conversation.

The Complainant argued that the evidence is clear that having complained about the racist jokes and remarks that were made in the clubroom on September 12, 1990, Legion officers took steps to, and were successful in, suspending her clubroom privileges. This suspension was discriminatory and contrary to the Code.

The Complainant argued that the Legion By-laws provide a reasonable process for the resolution of complaints, however the evidence is clear on the record that the personal Respondents in this case were not applying the By-laws in a fair or reasonable way, but rather were using the process to retaliate against the Complainant. The Complainant's representative argued that case law makes it clear that decision making processes must be fair, unbiased and objective, and cited Suchit v. Sisters of Saint Josephs for the Diocese of Toronto (1983) 4 C.H.R.R. D/1329 as an example of a biased employment process, found to be contrary to the Code.

THE COMPLAINANT'S SUBMISSION ON THE REPRISAL ISSUE

The Complainant argued that under Section 8 of the Code:

> Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act, and to refuse to infringe a right of another person under this Act, without reprisal or threat of a reprisal for so doing.

The only evidence addressing the issue of reprisal was presented by the Complainant, and in her submission there is ample evidence to support a prima facie case of reprisal.

The Complainant argued that the Totten complaint arose because of an argument between Totten and Barclay. Ms. Lundborg argued that the handling of the Totten complaint was just as unfair as the handling of the earlier complaints against Barclay. The evidence shows that the President sanctioned a complaint from a person whose membership had not been approved in accordance with the By-laws. Although President Moden was acting for the Legion on a human rights matter, he appointed the Investigating Committee and then appointed himself to chair the Special Committee which actually decided to expel Barclay. There was evidence that several members of the Branch 12 executive had no connection to the human rights complaint or the September 12, 1990 incident which led to the complaint. After denying Barclay's pre-emptory challenge, which by the by-law gave her a right to challenge a member of the Investigating Committee, President Moden, as chair of the Special Committee, recommended Barclay's expulsion. Then on the direction from Provincial Command, the Branch destroyed all the records of the proceedings, including President Moden's personal notes.

The decision to expel Barclay came after the Commission and the Respondents had settled. Ms. Lundborg also pointed out that Provincial Command disregarded the appeal period which Barclay was entitled to under the Legion By-laws, and within three days of the recommendation to expel Barclay, the expulsion was confirmed. The Respondents led no evidence to explain, or counter the evidence given by the Complainants, that in the Legion history only six people had been expelled and then only for very serious offences such as assault and embezzlement.

In conclusion, Ms. Lundborg argued that the corporate Respondent believed that Barclay's human rights complaint was about to be settled between the Respondents and the Commission and believing that Barclay was dropping her complaint, Branch 12 recommended to Provincial that she be expelled. Barclay certainly understood that she was being expelled because not only had she refused to settle, she had complained to the Human Rights Commission in the first place. Ms.

Lundborg submitted that she has clearly established that the expulsion was reprisal, contrary to the Code. The Complainant cites Entrop v. Imperial Oil Ltd. (1995), 23 C.H.R.R. D 1213 (No.7) in support of her argument:

> Human rights legislation is not punitive, but compensatory in nature. The central focus is upon the impact of the behaviour in question. Consequently, the Board of Inquiry is required to examine the impact of the action upon the perceptions of the complainant. If the complainant reasonably perceived the act to serve as retaliation for the human rights complaint, this would also constitute sufficient linkage, quite apart from any proven intention on the part of the Respondent.
> The proper standard under Section 8 is the "reasonable human rights complainant" in assessing the reasonableness of the complainant's fears and perceptions, Boards of Inquiry must be sensitive to the particular difficulties that confront complainants, many of whom experience great fear and anxieties surrounding the lodging and pursuit of a human rights complaint. This is exacerbated where the complainant continues in an on-going relationship with the Respondent, especially where that relationship is complicated by a differential in power ...

The Complainant argued that she was also in an on-going relationship with the Respondents who were in a position of power over her. When Totten pressured her to drop her human rights complaint and she refused, he filed a complaint against her for an alleged argument. President Moden, as President, used the Totten complaint as a means to expel the Complainant. The Complainant perceived the Totten complaint, and the way it was handled, as another attempt to punish her for complaining about the original racist conversation that occurred years before, in 1990.

THE RESPONDENTS' SUBMISSION

The Respondents deny that they have ever violated any section of the Human Rights Code, and they argue generally that there is no evidence to support the Complainant's allegations of discrimination and reprisal. The Complainant's allegations against them of violation of the Code is frivolous, vexatious and made in bad faith.

The Respondents representative, President Moden, also argued that the Complainant had changed her complaint since it was originally filed on December 12, 1990.

> The original complaint that started this unhappy saga was based on discrimination 'against self and persons of native ancestry.' Now we learn that the Complainant has unilaterally, changed the charge against the Respondents to discrimination 'against

> self' based on the Complainant's relationship, association or dealings with the person or persons identified by a prohibited ground of discrimination.

The Respondents argue further then that by changing the wording and intent of the original complaint, and the sections of the Code that the Respondents were alleged to have violated, that the Complainant is attempting, without an official motion to the Board, 'to enhance her chances of a favourable result from this hearing using an entirely different set of criteria than the original and amended complaint."

The Respondents argued that Branch 12 is a private recreational and service club for veterans, and that membership in the Legion is a privilege and not a right. Applicants for membership must meet certain admission standards. Each individual application is submitted to the branch membership, through the branch executive, and if approved is forwarded to Provincial Command for approval. The successful applicant must take an oath of initiation before becoming a member of the Legion.

President Moden submitted that it is Provincial Command that approves membership and conversely is the only body that can revoke membership. He argued that Branch 12 has no authority to make any decisions or take any actions on matters that are within Provincial Command's jurisdiction, unless specifically directed by them to act.

President Moden said that in 1988, when the Complainant was initiated into the membership of the Branch, she took an oath that states:

> I promise to be true to the purposes and objects of the Royal Canadian Legion as set forth in the Constitution thereof, to observe its rules and By-laws, and ever strive by all proper means to promote the work of the organization, including active participation in poppy campaigns.

President Moden also pointed out the provisions in the By-laws pertaining to the Legion's organization and administration, and particularly Article 3 of the By-laws which outlines the procedures which are to be used for the handling of "complaints and appeals." These provisions, he argued, are impartial and fair and provide penalties, if required, for any complaints that arise between members. President Moden argued further that the founding fathers of the Legion expected Article 3 to be used infrequently:

> Never in their wildest dreams, did they think that any member sworn to uphold the principles of the Legion would resort to arranging for an outside arm of government

> to become involved, to judge the correctness or otherwise, of the application of the rules by the elected officers.

President Moden submitted further that the motto of the Legion was "Service not Self," and if a person was disillusioned with the Legion or a particular branch she could always quit. A letter dated August 24, 1989 exemplifies the disillusionment in President Moden's opinion. In that letter the Respondent withdrew a complaint that she had been urged by other Legion members to file originally. However, she states in the letter that certain executive officers have sacrificed honour to protect reputation and have not shown personal integrity. She stated further that she had been "bullied, badgered, pressured and threatened with expulsion if she did not accede to the demands imposed upon her." President Moden argued that this letter exemplifies an attitude which contravenes the oath that she took to the Legion. He argues that as a result of this attitude, she "declared war on the Legion." Mr. Barclay sent copies of this particular letter to the then-Secretary/Manager, Ms. Haroldeen Wilson, Provincial Command and Dominion Command. It was President Moden's submission that this letter was a

> "direct and unnecessary slap in the face to all those veterans who have worked very hard over the years for the well-being of the branch. How L. Barclay could write what she did write shows little respect for the organization, she took an oath of initiation to support and work for a year earlier."

President Moden argued that from this point on, and, in his view, because of no response from the branch to this letter, Barclay used any and every opportunity to create problems for the branch and its officers. Thus this was the mind set, according to President Moden, of Ms. Barclay on September 12, 1990, when Barclay approached Paul and Markham and others at a table where she attempted to embarrass the two executive officers in front of their guests.

President Moden argued that the evidence supports that one of the guests at the Paul-Markham table was telling funny stories that made reference to both "nigger" and the "Oka situation." He submitted that the Complainant embellished what she had heard and coerced her companion, White, into making his statement of what happened. He argued further that it would not be possible, given where Barclay and her friends were sitting, for her to overhear the conversation of the Paul and Markham table, and that even when she was playing shuffleboard she was still some twelve feet from their table.

The Respondents' representative argued that the Complainant has provided no factual evidence proving that Paul of Markham made racist statements. It was his submission that I should accept the evidence of Paul as preferable to Barclay's in that she was an elected president of the branch, and that the Complainant's evidence should be given little weight since she has "shown by her actions little or no respect for the membership because of her various attempts to hurt the well-being of Branch 12." He argued further with regard to this incident that four witnesses had stated under oath that the alleged conversation of a racial nature did not take place on the evening of September 12, 1990, and that the statement that Markham made, as per the evidence of White, is not true.

President Moden argued in conclusion that without establishing that a racial conversation took place that evening,

> ...the foundation for all subsequent events used as evidence in this hearing should be considered as having no connection with the violation of the Human Rights Code. All other actions taken by, and/or against the Complainant, since she is a non-native, after the September 12, 1990 incident are for the discipline and control of the private recreation and service club known as Branch 12, Royal Canadian Legion, and as such do not come under the jurisdiction of the Board of Inquiry.

He argued that "every person is entitled to enjoy the private rights possessed by her or him without any interference by others." Since Barclay had no right to assume any authority to chastise or admonish another member in the clubroom, she herself breached clubroom rules. He argued that she should have advised the bar stewardess of her displeasure, and leave all disciplinary action to the bar stewardess.

President Moden submitted that the Complainant knew that by acting the way that she did on September 12, 1990 disciplinary action would be taken against her. President Moden said that had Barclay been sensible she would have withdrawn her complaint when Caithcart withdrew her complaint against Barclay. Thus he argued that Markham had no choice but to file his complaint against Barclay knowing that it was a frivolous claim with no basis in truth.

It was President Moden's submission that the structure and organization of the Legion is fashioned after the organization of the military. Although in the branch clubroom all members are considered of equal status, he argued that it is an accepted fact that veteran members, who fought

during World War II, have a special respect in the branch. These members are also elders within the branch, most of whom have worked long and hard for the benefit of the Legion, veterans and their families. President Moden argued that Markham's statement to Barclay, recommending that she file no complaint after the incident on September 12, 1990, should not be interpreted as Barclay has interpreted it as a threat, but merely the friendly advice of an elder member of the Legion.

President Moden argued that the complaint against Barclay was handled meticulously according to the by-laws. This complaint was upheld and Barclay was suspended as permitted under the by-law. He argued further that there was no conflict of interest in Paul chairing the Investigating Committee on the Markham complaint. He argued that there was no linkage between the alleged conflict of interest and any violation of the Code.

Regarding Barclay's removal from the clubroom on October 20, 1990, President Moden submitted that the Complainant was honour-bound, having received the notice of deprivation of clubroom privileges, not to enter into the clubroom. Thus by entering the clubroom on October 19 and 20 she showed lack of respect to the Legion By-laws. In his view the Complainant is responsible for her own injuries in being removed from the clubroom. President Moden argued that it is the branch president who is ultimately responsible for clubroom services, although the bar staff and secretary manager assisting in those functions. Thus Paul had the right to have the police escort Barclay out on the evening of October 20, 1990.

As a result of the incident of October 20, 1990, two formal complaints were filed with the branch secretary manager. One was filed by Ms. E. Ballantyne under Section 302(1)(e), "conduct which in any way brings or tends to brings or intends to bring the Legion into discredit.", and one by President Paul, under Section 302(1)(a), "breach of clubroom rules or privileges," and Section 302(1)(e), "conduct which in any way brings or tends to bring the Legion into discredit." These were handled separately with Investigating Committee hearings, and according to President Moden, since the complaints of Ballantyne and Paul address the same incident, "the Special Committee ruled that the two penalties would run concurrently to any previous penalties. By doing so the Special Committee of the executive showed compassion for L. Barclay."

President Moden argued that overhearing a racist conversation would not be enough for a finding of a violation of Section 1 of the Code. He states that there has been no evidence provided to this Board that any right under Section 1 or Section 9 has been violated.

In summary, President Moden argued that Barclay is not an native or a person of colour and, therefore, she can't say she is in a protected group for the purposes of this case. The penalties that have been imposed upon her by the Legion have been done so according to the By-laws. Thus there is no evidence to support any breach of the Code and the complaint should be dismissed. He cited Dwayne Baptist v. Napanee (1991) (Ont. BOI) 25 C.H.R.R.

THE CORPORATE RESPONDENT'S SUBMISSION ON THE REPRISAL COMPLAINT

President Moden argued that there was nothing improper in him posting a notice asking for volunteers to sit on the Investigating Committee for the Totten complaint. However he argued that what was improper was that Barclay tendered this notice as evidence before this Board. In response to the Complainant's argument that denying the pre-emptory challenge to one of the members of this committee was improper, he stated that Barclay wrote to the then-Secretary/Manager on May 29, 1995 objecting to B. Springett sitting on the Investigating Committee. The letter stated that Barclay thought the association of Springett and Paul was too close for Springett to be objective in that investigation. President Moden argued that since Paul had no connection with the Totten complaint, it was his view that Barclay was trying to obstruct the process for her own purposes. President Moden acknowledged that Section 304(7) of the By-laws states "the member complained against, and the complaining member may each, by pre-paid, certified or registered mail or courier, have the privilege of one pre-emptory challenge of any of the members." President Moden argued in conclusion that there was nothing in the Legion By-laws which states that the pre-emptory challenge must be obeyed by the branch president. President Moden pointed out that the Complainant did not present herself at the Investigating Committee hearing, and instead sent a notarized statement.

President Moden further argued that there was nothing improper in him chairing the Special Committee of the Executive which reviewed the decision of the Investigating Committee. Section 301(2) of the By-laws details the composition and reporting requirements of the Special Committee of the Executive and the by-law was followed.

President Moden argued on behalf of the Respondent that Branch 12's recommendation to Command to revoke Barclay's membership should not be considered as discrimination against her. He argued that violating a section of the Code requires an act of violation, not merely a written recommendation. Since it was Command who made the decision to expel, and they are not parties to this complaint, Branch 12 can not be said to have discriminated against the Complainant. He stated further that there were "no cases reported in the Canadian Human Rights Reporter where a recommendation for an action had been used as the basis of a discrimination charge against a non-native person and/or discrimination charge because of that person's relationship with a person/persons identified by a prohibited ground of discrimination." In conclusion, President Moden argued that Barclay had presented no evidence which showed that the revoking of her membership in the Legion was in retaliation for her human rights complaint and she had no right to argue that the decision to revoke, which was made by Command and not Branch 12, was therefore the Respondents' responsibility. Thus the Respondents argued that this Board should dismiss this complaint.

MS. PAUL'S SUBMISSION

Mr. Markham made no submission. However, Ms. Paul made a brief submission. She stated that when a president is socializing she is just an ordinary person within the clubroom and it is the bartender's job to maintain order in the clubroom. On the night of September 12, 1990 she admitted that the word nigger was used at the table, but it was by one of the guests at the table. She stated in her submission that the evidence on October 20, 1990 is that she did not ask Barclay to leave before calling the police to have her removed. She was not involved in any way with the Totten complaint filed in 1995 against Barclay.

COMPLAINANT'S AND RESPONDENTS' SUBMISSION ON BENTLEY v. ROYAL CANADIAN LEGION (1995) 24 C.H.R.R. D/416

After this case was closed, this Board became aware of the Bentley decision, a human rights case in British Columbia which dealt with the jurisdiction of the council to review certain acts of the Legion. The Respondents had raised a jurisdictional argument that the Legion was a private club and the individual Respondents were having a private conversation and, therefore, even if it was a racist

conversation on September 12, 1990, the Board of Inquiry had no jurisdiction to make a finding against the individuals. The Respondents, of course, clearly denied that there had been any such racist conversation, but there was also a jurisdictional argument being made although the representative of the Legion may not have called it that. Since the Bentley case addresses the very same issue, and in fact the same argument was made in that case by the Legion, (namely, that it was a private club and therefore exempt from Human Rights legislation) I had the Deputy Registrar send the case to the Complainant and Respondents and invite their comment should they wish to make one by July 15, 1996. Both the Complainant and the Respondents made submissions on Bentley.

As a result of the Respondents' submission, dated July 3, 1996, the Complainant objected strenuously that President Moden had included much in his submission that was not in evidence, and had included two affidavits sworn by an individual who was present on September 12, 1990, but who was unable to come and give evidence in person at the hearing and which had not been admitted into evidence.

It is important to be clear that I did not rely on submissions that included information that was not put into evidence. During the hearing I did my best to assist both sides, since they were not represented by counsel, in explaining the process of the hearing, when and how to put in evidence, when and how to argue on the evidence. I asked both parties to take time and review the evidence they had put in before deciding to close their case. Nevertheless, during President Moden's final argument, he made submissions on information that had not been put into evidence. Each time that occurred, I stopped him and made a note on his written submission that this was not in evidence. I have painstakingly reviewed the record, that is my own notes of the hearing since there is no transcript, and the submissions to ensure that I have relied only on evidence on the record.

In the Respondent's submission of July 3, 1996, President Moden questioned why the affidavits of one individual present on September 12, 1990 were not entered into evidence. I did not allow this evidence because the Complainant would have had no opportunity to cross-examine this individual. This witness was not available for the December hearing days because she was in Florida at the time. The Board offered to set a date when this individual was available to give her an opportunity to give her evidence orally. This offer was not acceptable.

THE COMPLAINANT'S SUBMISSION ON BENTLEY

The Complainant submitted that the Respondents in this case had argued that Branch 12 was a private club and that the Board did not have jurisdiction to review actions of the Legion taken against Barclay (see Sections 4, 6, 7 and 63 of the Respondents' closing arguments). The Complainant argued that Bentley was instructive and dealt with the issue of Legion membership.

The Board in Bentley held that British Columbia's human rights legislation was applicable to Legion membership by finding that "membership in the Legion as administered by the Branch is a service or facility customarily available to the public within the meaning of Section 3 of the Act." The Board in Bentley held further "that membership in an organization can not be separate from the services and facilities provided by the organization, particularly where the services are only available to members." Letendre v. Royal Canadian Legion, Branch 83, (1988), 10 C.H.R.R., D/5846 (B.C.C.H.R.) cited in Bentley, found that the Legion canteen provided services to which the public is customarily permitted, even though there are eligibility requirements for being permitted to use the canteen. The Respondents also pointed out that the Board in Bentley relied heavily on the Supreme Court decision, British Columbia Council of Human Rights and Janis Berg v. University of British Columbia, School of Family and Nutritional Sciences, University of British Columbia v. Berg (1993) 102 D.L.R. (4th) 655, in deciding whether it had jurisdiction to deal with this complaint regarding the Legion. Without summarizing the whole submission, the complainant pointed out that the Supreme Court in Berg held:

> the court rules that where the service provider has discretion with respect to the granting or withholding of a service ... the service provider is not insulated from human rights scrutiny. Discretion must be exercised in a non-discriminatory way...
>
> .

The complainant argued therefore, that the Ontario Code was applicable to the Legion's treatment of Ms. Barclay.

THE RESPONDENTS' SUBMISSION ON BENTLEY

The Respondents asked for permission to make a specific response to the Complainant's submission on Bentley, and I directed the Deputy Registrar to let both sides know that if they wished to make submissions in response to the other that was permissible. In a submission dated August 19,

1996 the representative of the Respondent, President Moden, conceded that this Board does have jurisdiction to review the actions of Branch 12 and that the Legion is not immune to human rights legislation in Ontario. President Moden submitted the following at paragraph 1:

> The Respondents have NEVER argued that the Board did not have jurisdiction with regard to Branch 12's actions against Barclay. The words in Sections 4, 6, 7 and 63 of the Respondents' closing arguments make no reference at any place to the jurisdiction of the Board of the Inquiry.

The Respondent went on to submit that what he did argue on behalf of Branch 12 and the personal Respondents was that Barclay had no foundation to make her accusations. In other words, there was no evidence to support her accusation that a racist conversation had taken place on September 12, 1990. Any and all actions taken against Barclay by Branch 12 were "done to try and prevent the future bad conduct and misbehaviour of L. Barclay in the branch clubroom, and to protect the future security of Branch 12's liquor license." Most of the rest of this submission by the Respondents repeats the original closing argument and when it addresses the Bentley case does not address the jurisdiction issue.

DECISION

Respondents' Submission on Preliminary Issue

At the beginning of closing argument the Respondents argued that the Complainant had unilaterally changed the grounds of her complaint. Having reviewed the complaint dated December 12, 1990 which alleges breaches of sections 1, 8 and 11 of Code (now numbered as sections 1, 9 and 12) I find that the Complainant has not altered her original complaint as suggested by the Respondents. She was permitted by the Board after a motion including full argument by the parties to amend her complaint to add the complaint of reprisal for actions taken in 1995 by the Corporate Respondent.

Jurisdictional Issue

The next issue which I must address is whether or not Branch 12 of the Royal Canadian Legion, as it provides goods, facilities and services to its members and the public, is exempt from the provisions of the Code. Having reviewed the submissions of the parties I find I agree with the

argument of the Complainant, the reasoning in the Bentley case and the cases cited therein, that this Board does have jurisdiction to review the Respondents' decision to suspend and then expel Barclay from the Legion to see if Branch 12's discretion was exercised contrary to the Code.

Section 1 of the Code provides:

> Services - every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

In considering whether or not the Code applies to the provision of services by the Legion, I find that it is significant that the legislature amended the Code in 1981, removing the phrase "to which the public is customarily admitted." This amendment of the legislation clearly shows that the legislature did not intend to insulate the provision of services in a private club from human rights provisions. Thus I do not need to make a finding that Branch 12 is of such a public nature that the Code applies, as in Bentley. Moreover, I agree with the analysis in Bentley that the Legion is an institution of such a public nature that the Code applies.

Unlike the Ontario Code, the legislation in British Columbia includes the qualifying language that discrimination is prohibited with respect to services "customarily available to the public." Thus the Board in Bentley had to decide whether or not the Legion was of a public enough nature for the British Columbia human rights legislation to apply. The Board decided that whether the Legion is itself a public or private organization is not determinative of whether its services or facilities are "customarily available to the public." Bentley cites, "the Supreme Court in Berg, and the appropriate approach to take in determining whether a particular service or facility is customarily available to the public:

> ... one must take a principled approach which looks to the relationship created between the service or facility provider and the service or facility user by the particular service or facility. Some services or facilities will create public relationships between the school's representatives and its students, while other services or facilities may establish only private relationships between the same individuals (emphasis in original) (at 687).

The Board concluded that the Legion had a significant public profile, and was bound by the British Columbia human rights law.

> The Legion has a public profile which imbues the relationship between its membership pool with a public aspect. In my view, the nature of the services and facilities provided by the Legion and the size of its membership pool establish that membership in the Legion is of a public character, and is part of a public relationship between the Legion and its membership pool. I consider it contrary to the intent of human rights legislation that access to membership in an organization with a public aspect, such as the Legion, not be subject to s.3 of the Act. The furtherance of human rights and equality of all people would be unreasonably restricted if an organization with a public image and role such as the Legion's could restrict its membership on the discriminatory grounds that are protected in human rights legislation (at D/418).

Further, the Board in Bentley held that a denial of membership, if it is based on improper grounds, could be a violation of the Act.

The Board held:

> ...membership in an organization can not be separated from the services or facilities provided by the organization, especially when the services or facilities are only available to members. If the services or facilities are customarily available to the public, access to those services or facilities can not be blocked by imposing discriminatory restrictions on membership" (at D/418).

Thus the Board in Bentley held that she could review the Legion's decision which denied membership to the complainant in that case to assess whether or not the Legion had denied the membership for reasons contrary to the Act.

The complainant in the case before me had her privileges for using the facilities and services of the Legion suspended for two years less a day and was ultimately expelled from the Legion. Following the reasoning of the Bentley case, I find that the suspension and expulsion of Barclay must not be for reasons which are contrary to the Code, and I therefore have jurisdiction to review the Respondents' decisions.

Does Barclay Have the Right to Claim Discrimination Based on Association?

The next issue I must address is whether the Respondents discriminated against the Complainant because of her association with first nations people. Section 12 of the Code provides:

> A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited group of discrimination.

The Complainant argues that she is associated with persons of first nations ancestry: she grew up in an orphanage with girls of those descents. Barclay was "the first non-native to be voted an honourary member of the Indian and Metis Friendship Centre in Winnipeg" in 1960. Because of this association Branch 12 discriminated against her by suspending and then ultimately expelling her from the Legion. Had Ms. Barclay been a person belonging to a protected group herself, she would still have the onus to prove that the actions of the Legion were based on her protected status and, therefore, improperly founded. However, in this case she has the added burden of showing that it is because of her association with persons of first nations ancestry that discrimination occurred by the Legion.

The cases cited by the Complainant are helpful. Before the Code was amended in 1981, to include section 12, two Boards of Inquiry held that a Respondent could be found to have discriminated against a complainant, even though the complainant was not a member of an protected group. In Jahn v. Johnstone, supra, the complainant's landlord told his white tenant to move after the complainant had entertained a dinner guest who was a person of colour. The Board held in that case that the landlord had discriminated against the tenant in a "term and condition of occupancy."

In a similar case, Tabar v. Scott, supra, the complainant was not permitted to sign a sub-lease to persons of East Indian or Pakistani origin. Even before the amendment of the Code to include Section 12, the Board of Inquiry found that the complainant had been discriminated against because of the association with a person to whom he wished to sub-lease who were persons of an identified protected class.

The Complainant argued that she demonstrated her association with members of first nations ancestry and people of colour when she confronted a racist conversation in the Legion. I agree. Having stood up and spoken against racism, she clearly associated herself with first nations people and persons of colour. If as result of this the Legion retaliated against her by suspending her privileges, then this would be contrary to the Code.

The Complainant also argued that she is entitled to be free of a "poisoned" atmosphere which would seem to be an argument that she is entitled to be free of racial harassment when she enjoys the facilities and services of the Legion. I heard no argument on this except the Respondent's submission that a racist conversation in a private club, if it occurred, cannot result in a breach of the Code and the Complainant's argument that she should be free of a "poisoned" atmosphere at the Legion.

In 1981, the Code was amended to prohibit harassment in employment and accommodation, and harassment was defined as "a course of vexatious comments or conduct". Since the conversation on September 12, 1990 was one incident, and given the nature of the discussion, it cannot amount to harassment under the Code. Boards have been consistent in holding that more than one event is necessary to establish "a course of conduct." There is an issue as to whether a Board would find that the Code protected harassment, even if established, in the provision of services, although with the benefit of a full argument, it may well do so. Thus in this case I do not find that even if a racist conversation occurred on September 12, 1990, it amounted to harassment, or a "poisoned" atmosphere.

However, as reasoned above, I find that by standing up to a racist conversation the Complainant demonstrated that she was associated with persons protected under the Code, persons of first nations ancestry and of colour, and therefore any action taken by the Legion based on her action to stand up against a racist conversation, if proven, would amount to a breach of the Code.

Has A Prima Facie Case of Discrimination Been Established by the Complainant?

Having carefully reviewed the evidence of the Complainant and Respondents, I have concluded that there is ample evidence to make a finding that a racist conversation took place at the Paul-Markham table on September 12, 1990. It is not necessary for me to find that the personal Respondents themselves made racist remarks, although I accept the evidence of White that Markham made racial remarks of a threatening nature as noted earlier in the summary of evidence. Paul, in her evidence, admitted that the word nigger was used by a guest seated from another Legion at the table, although she also denied that any racist remarks were made. Perron, also at the table, testified that no racist remarks were made, and then said that the guest at the table told jokes about "niggers."

It was clear that the Respondents were of the view that they were having a private conversation and it was no business of Barclay's to interfere. However, the evidence was that the conversation was so loud that it was impossible not to overhear without leaving the clubroom. The clubroom was not all that busy on the night of September 12, 1990 and even the bar room steward standing at the bar was able to hear the jokes told by the guest at the table.

Additional evidence was given by the Complainant showing racist attitudes of the personal Respondents outside the evening of September 12, 1990 which tends to support the finding that a racist conversation occurred. Windsor testified for the Complainant that on one occasion when he told Markham about his efforts to raise the issue of benefits for native veterans Markham's response was "god damned fucking Indians." Another witness for the Complainant, Wilson, testified that Paul gave her a documents entitled "Indian Application for Employment" and "Never Trust an Indian" which was submitted as evidence. Wilson testified further that Paul appeared to think these documents were funny. Finally, certain inconsistencies in Paul's and Markham's evidence and their demeanor at the hearing led me to prefer the evidence of the Complainant and White when they testified they clearly heard the personal Respondents' engaging in a racist conversation. For example, Paul initially took the position that she had asked Barclay to leave the Legion on October 20 before calling police, but admitted in cross examination that this was not true. Both of them tended to be evasive when questioned about the fairness and decisions to suspend Barclay when Markham made his complaint against here. In contrast, White and Barclay were clear, consistent and forthright in giving their evidence.

As noted earlier, a finding that a racist conversation occurred in the clubroom in and of itself does not lead to a finding that the Complainant's human rights had been violated. However, having reviewed the evidence on what occurred after the night of September 12, 1990, I find that there is ample evidence to prove a prima facie case of discrimination in the way Barclay was treated when her clubroom and Legion privileges were suspended. The Respondents argued vehemently that the action to suspend Barclay was done in an unbiased and objective manner according to the Legion By-laws. But the evidence does not support such a finding.

The evidence is that the Respondents felt angry at being confronted about their racist conversation. They could have ignored the incident. But instead, as Markham had indicated to Barclay, he decided to get rid of her. Although the initial complaint filed by Caithcart was withdrawn, it was not withdrawn before Barclay, in defense of herself, filed a complaint against Paul and Markham with Provincial Command, and subsequently with the Human Rights Commission. Barclay's complaint to Provincial Command immediately led to Markham's complaint alleging that Barclay's was malicious and not true.

I agree with the Complainant's submission that there was nothing that was fair or consistent with due process in the way that the Markham complaint was handled. Paul, who is Markham's spouse, was chair of the Investigating Committee of this complaint. She was named in Barclay's complaint to Provincial Command and so clearly had a personal interest in the outcome. The potential for bias was too great in having her chair the investigating committee. Further, the Committee met before Provincial Command had even decided whether or not Barclay's complaint had any merit. Markham appointed the investigating committee for the Ballantyne and Paul complaints, although these complaints were clearly tied to his own complaint.

Without any further evidence for the Respondents to explain why they suspended Barclay and why the process was so unfair, and given Paul's treatment of the Complainant on October 20, 1990, I am left with a strong inference that because the Complainant complained about a racist conversation , the Respondents retaliated by using the discipline procedures of the Legion By-Laws to suspend her privileges.

I should make it clear in this decision that there is nothing in the Legion By-laws that would lead me to believe that the process is inherently unfair or biased. Rather it was the use of the By-laws by the personal Respondents acting on behalf of the corporate Respondent that was biased, unfair and contrary to the Code. Considering all the evidence, I am convinced that the Respondents used the Legion's complaint process to retaliate against Barclay for her criticism of their racist jokes and thus, they have breached Section 1 of the Code.

Reprisal

The Complainant was permitted to amend her human rights complaint on November 15, 1995 alleging that the Legion had contravened Section 8 of the Code by acting to expel her from the Legion. Section 8 of the Code provides:

> Every person has a right to claim and enforce his or her rights under this act, to institute and participate in proceedings under this act, and to refuse to infringe a right of another person under this act, without reprisal or threat of reprisal for so doing.

The evidence with regard to this issue was provided by the Complainant. The only evidence provided by the Respondent was Totten's evidence as to what led to his complaint in 1995. Strain who chaired the Provincial Command Review Committee had no memory of what evidence was used to justify

Barclay's expulsion. Thus, if I find that the Complainant has established a prima facie case of reprisal, she must succeed in this part of the complaint.

After careful review of the evidence and the submissions of the parties, I have decided that the Legion's expulsion of Barclay was done to retaliate against her for filing a Human Rights Complaint, and for not agreeing to the settlement approved by both the Respondents and the Commission. Since the evidence has been summarized in some detail above, I will only refer to what is necessary to provide my reasons for finding that the Legion has violated Section 8 of the Code by expelling Barclay.

The decision in Entrop noted that in order to find a violation of Section 8, a Board must make certain findings. "There must be evidence of an actual or threatened prejudicial act," and "a linkage between the actual or threatened prejudicial act and "the enforcement of a person's rights under the Code." The Board also held:

> Where there is evidence that the Respondents intended the act or threat to serve as retaliation for a human rights complaint, this will establish the requisite linkage. However, as it is well established in human rights jurisprudence, the inability to prove intention is not fatal to the claim. There are many situations in which the Respondent is not consciously aware of the discriminatory impact of certain behaviour. The detrimental effect of such actions can still create substantial damage.

The prejudicial act in this case is Barclay's expulsion. The process followed to expel Barclay clearly supports a finding that the Legion was acting to punish or in reprisal of her human rights complaint.

The Complainant's evidence was that very few members of the Legion across Canada have ever been expelled, and then only for very serious crimes such as aggravated assault and embezzlement. However, Barclay was ultimately expelled because she had an argument with Totten in the clubroom which led to a review of her past five years of "offenses". Even if we accept Totten's version of the facts and not Barclay's, her punishment was too severe.

Although the Investigating Committee into the Totten complaint recommended a suspension which in and of itself seems harsh, given the conflicting evidence of what happened, it is the action of the Special Committee, chaired by President Moden, that leads me to conclude that the Legion's action to recommend expulsion was reprisal. President Moden's committee reviewed the last five

years of Barclay's "offenses" to decide to expel her from membership. This recommendation was made to Provincial Command who confirmed it within three days.

However, there is no evidence before me of what Branch 12 relied on to make its decision to recommend expulsion. President Moden told this Board that he was instructed by Provincial Command to destroy any and all documents relating to the Totten complaint and the recommendation to expel. Strain testified that Provincial had destroyed all documents pertaining to the complaint and their review of the recommendation to expel.

The Respondent called no evidence to explain why the expulsion was reasonable. Although the documents were destroyed, witnesses could have given evidence of the process and why the decision was made. Given the evidence and the time of the expulsion (just after the Legion had settled with the Commission) I have to conclude that the actions of the Legion were taken for improper motives and in retaliation or reprisal against Barclay for filing a human rights complaint. Contrary to the Respondent's submission that Barclay "declared war on the Legion," I am of the view that Branch 12 "declared war" on Barclay. President Moden's view of a member who files a Human Rights Complaint is evident in his submission quoted earlier in this decision. He clearly disapproved of "any member sworn to uphold the principles of the Legion ... arranging for an outside arm of the government to become involved, to judge the correctness or otherwise of the application of the rules by the elected officers" [of the Legion]. Without any evidence from the Respondent to explain the decision to recommend her expulsion, Barclay succeeds in her complaint that the Legion acted contrary to Section 8 of the Code.

Remedy

The Complainant asked the Board for the following should I find in her favour. She asked that the Corporate Respondent send a letter by registered mail, with return receipt, to the Provincial and Dominion Command of the Royal Canadian Legion requesting that the expulsion of Lynne Barclay be rescinded and that she be reinstated to membership in Branch 12. The Complainant also requested that the letter to Provincial and Dominion Command requesting her reinstatement include a copy of the decision of this Board of Inquiry. The Complainant asked for general damages

amounting to $10,000 for each breach of the Code by the Corporate Respondent. The Complainant requested damages of the Personal Respondents, Paul and Markham, of $500 each.

In support of her request for damages, the Complainant argued that the actions of the Respondents were willful and reckless and as such deserved the maximum damages that can be awarded by a Board which is $10,000. Barclay asked the Board to consider the evidence that Markham and Paul, as officers of Branch 12, threatened, emotionally traumatized, physically assaulted, and publicly humiliated her in a small community where the Legion is an important sub-community. Then President Moden, as an officer of Branch 12, took steps to ensure that she was expelled from the Legion. This treatment caused her great mental anguish and she was deprived of an important social community.

The Respondent argued that the Corporate Respondent was in no position to pay these kinds of damages, and there was a strong suggestion that it would not survive an order to pay $20,000 in general damages. There was also a strong suggestion by the representative of Branch 12 that the request for damages, that is the money, was all Barclay wanted.

Having carefully considered the request for relief by the Complainant, I have decided to grant the relief requested except as to the award of general damages against the Corporate Respondent. I disagree strongly with the Corporate Respondent's inflammatory submission that the Complainant only wanted the money or to destroy the Branch. I agree with the reasoning of the Board of Inquiry in Willis v. David Anthony Phillips Properties, 8 C.H.R.R., D/3847, where Professor Adell held:

> Awards of general damages under the Human Rights Code, 1981, should be high enough to provide real redress for the harm suffered, insofar as money can provide such redress, and high enough to encourage respect for the legislative decision that certain kinds of discrimination are unacceptable in our society ... no award should be so low as to amount to a mere 'license fee' for continued discrimination. At the same time, fairness requires that an award bear a reasonable relationship to awards made by earlier Boards of Inquiry.

The Willis case involved discrimination against a woman and her two babies because the mother was in receipt of public assistance. The Board found that the children were badly upset by the disruption that the discrimination caused and awarded $1,000 in general damages. Typically, Boards have awarded somewhere between $2,000-4,000 for breaches of the Code. Damage awards to complainants are not made to punish the respondents. After much consideration, I have decided that

each Respondent must pay $500 for the breach of Section 1 and 12 of the Code, and the Corporate Respondent must pay $3,000 for its reprisal, the breach of section 8 of the Code.

ORDER

Having found the Corporate Respondent and the Personal Respondents to be in breach of Section 1 and 12 of the Code, and the Corporate Respondent to be in breach of Section 8 of the Code, and for the reasons noted above, it is hereby ordered:

1. That the Corporate Respondent send a letter by registered mail with return receipt to the Presidents of both Provincial and Dominion Command of the Royal Canadian Legion requesting that the expulsion of Lynne Barclay be rescinded and that her membership in Branch 12 be reinstated immediately. A copy of this decision is to be included with the letter so requesting her reinstatement.
2. That the Corporate Respondent pay the Complainant, Lynne Barclay, the sum of $500 in general damages for its breach of Section 1 and 12 of the Code.
3. That the Corporate Respondent pay the Complainant, Lynne Barclay, $3,000 in general damages for its breach of Section 8 of the Code.
4. That the Personal Respondents, Paul and Markham, each pay the Complainant, Lynne Barclay, the sum, of $500 as general damages arising out of their breach of Section 1 and 12 of the Code.

   Post-judgment interest at the Courts of Justice Act rate shall begin to accrue one month after the date of this decision.

I shall remain seized to deal with any difficulties in the implementation of the order.

Dated at Toronto this 24 Day of September, 1997.

D.J.D. Leighton, Board of Inquiry